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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN MARIANA ISLANDS

8 UNITED STATES OF AMERICA,) CRIMINAL CASE No. 24-CR-00010
9)
Plaintiff,) MEMORANDUM OF LAW IN SUPPORT
vs.) OF MOTION TO STRIKE SURPLUSAGE IN
10) INDICTMENT
11 HONGJIANG YANG,) Hearing: April 18, 2024
12) Time: 9:00 a.m.
Defendant.) Judge: Hon. Ramona V. Manglona, C.J.
13)
14)

15 Defendant Hongjiang Yang (“Mr. Yang”), pursuant to Rule 7(d) of the Federal Rules of
16 Civil Procedure, respectfully moves the Court to strike the following surplusage in the Indictment
17 (ECF No. 2):

18 1. All references to unlawful entry to Guam, including the phrase “unlawfully enter”
19 and the reference that Defendant and the eight other Chinese nationals “knowing
20 and in reckless disregard of the fact that [they] had no right or authority to enter
Guam”; and
21 2. The phrase “in furtherance of a violation of law.”

22 Alternatively, the Court should order that the Indictment not be shown, or read entirely, to
23 the jury and that at trial, the Court will determine what portion, if any, of the Indictment will be
24 read to the jury.

25 I. Legal Standard
26

27 Rule 7(d) of the Federal Rules of Criminal Procedure permits a court to “strike surplusage
28 from the indictment” upon a defendant’s motion. “The purpose of a motion to strike . . . is to

1 protect a defendant against prejudicial or inflammatory allegations that are neither relevant nor
 2 material to the charges.” *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir.1988) (internal
 3 quotation marks omitted).

4 As an example, in *United States v. Vastola*, 670 F. Supp. 1244, 1254-55 (D.N.J. 1987), the
 5 court struck the entire preamble of an indictment, colorful terms such as “loansharking,” and
 6 language suggesting uncharged illegal activities, as surplusage. The indictment charged 21
 7 defendants allegedly involved a criminal organization that engaged in extortion. *Id.* at 1254. It
 8 contained a preamble that not only identified the various defendants, but also described their
 9 respective roles and stated that they were involved in illegal activities not charged in the case. *Id.*
 10 at 1254-55. The court pointed out that “[a]nything in the indictment that allows the jury to infer
 11 involvement with uncharged crimes (whether the inference is based on the location of narrative
 12 descriptions or the content of such descriptions) is improper.” *Id.* at 1255. Therefore, it struck the
 13 preamble, *id.*, as well as phrases suggesting uncharged illegal activities such as “and with others,”
 14 “and others,” and “and other criminal means,” *id.* at 1256. In addition, the court struck
 15 “loansharking” and “loanshark,” reasoning that they were not terms used by the underlying statute,
 16 and that to the extent those terms suggested criminally usurious loans, they were prejudiced
 17 because such activities were not necessarily violent or threatening as extortion. *Id.*

21 **II. Allegations in the Indictment**

22 The Indictment charges Mr. Yang with Conspiracy to Transport Illegal Aliens under 8
 23 U.S.C. §§ 1324(a)(1)(A)(ii) and (A)(v)(I). It alleges that around July 9, 2023, “[Mr. Yang] and
 24 others orchestrated a plan to transport [Mr. Yang] and eight other Chinese nationals” from CNMI
 25 to Guam, “with the intent to unlawfully enter and reside in Guam,” knowing and in reckless
 26 disregard of them having no right or authority to “enter” Guam and being illegally present in the
 27 U.S. (ECF No. 2 at 1.) According to the Indictment, “in furtherance of the plan,” Mr. Yang and
 28

1 the eight other Chinese nationals “hired, and thereby conspired with four previously-indicted
 2 United States citizens.” (*Id.* at 1-2.) The Chinese nationals, including Mr. Yang, together with two
 3 of the U.S. citizens, boarded a small motorboat leaving from Saipan “with the intent of transporting
 4 the Chinese nationals to . . . Guam . . . in furtherance of a violation of law.” (*Id.* at 2). The
 5 Indictment goes on to state that, “[o]n or about July 10, 2023, the boat ran out of fuel and began to
 6 drift just before it reached the island of Rota, thus necessitating a rescue operation by the United
 7 States Guard.” (*Id.*)

9 III. Argument

10 A. All References to Unlawful Entry to Guam Should Be Struck

11 The Court should strike the references in the Indictment related to unlawful entry to Guam.
 12 Those references are irrelevant and immaterial to a conspiracy to transport illegal aliens
 13 offense because entry to Guam is not an element of the offense. Section 1324(a)(1)(A)(ii) makes
 14 it a crime if any person:
 15

16 knowing or in reckless disregard of the fact that an alien has come to, entered, or
 17 remains in the United States in violation of law, transports, or moves or attempts to
transport or move such alien within the United States by means of transportation
 18 or otherwise, in furtherance of such violation of law.

19 8 U.S.C. § 1324(a)(1)(A)(ii) (emphasis added). Section 1324(a)(1)(A)(v)(I) then makes it a crime
 20 for any person to “engage[] in any conspiracy to commit any of the preceding acts,” which include
 21 the above offense of transporting an illegal alien. Transportation “within the United States” is
 22 relevant and material, whereas “entry” into a state or territory is not. Knowledge as to the fact that
 23 an alien came to, entered, or remained the U.S. unlawfully is relevant and material, whereas
 24 knowledge as to the “fact” that an alien has no right or authority to go from Saipan to Guam is not.
 25

26 The unlawful entry references are prejudicial and inflammatory. They signal to a jury that
 27 Mr. Yang committed another illegal activity, *i.e.*, unlawfully entering Guam, which is uncharged
 28 and cannot be charged because it is not a crime by itself as held by the Ninth Circuit in *United*

1 *States v. Li*, 643 F.3d 1183, 1189 (9th Cir. 2011). The reference in the Indictment to Mr. Yang and
 2 the other Chinese nationals “knowing and in reckless disregard of the fact that [they] had no right
 3 or authority to enter Guam” is colorful language similar to that in *Vastola*, 670 F. Supp. at 1255.
 4 It is not a phrase used by Section 1324. In a way, it is worse than the “loansharking” language in
 5 *Vastola* because it imitates the phrasing of Section 1324 (“knowing or in reckless disregard of the
 6 fact that an alien has come to, entered, or remains in the United States in violation of law”) but
 7 changes it into something that is irrelevant and immaterial. A jury can easily be misled and
 8 inflamed.

9
 10 Mr. Yang is aware that the Ninth Circuit, in *United States v. Laurienti*, 611 F.3d 530, 547
 11 (9th Cir. 2010), held that the characterization of certain sales practices as unlawful was relevant
 12 and it was not an abuse of discretion for a district court to refuse to strike it. That case is
 13 distinguishable because in *Laurienti*, the offense charged was a securities fraud conspiracy for the
 14 purpose of enriching the defendants by means of fraudulent sales of securities, *id.* at 534, whereas
 15 here, the Section 1324 offense charged involves whether the boat trip was in furtherance of aliens
 16 remaining in the U.S. illegally, not whether the boat trip itself was an unlawful entry into Guam
 17 on the part of the aliens.

18
 19 **B. The Phrase “in Furtherance of a Violation of Law” Should Be Struck**

20
 21 Section 1324 employs the phrase “in furtherance of such violation of law.” 8 U.S.C. §
 22 1324(a)(1)(A)(ii). This is an essential element of the substantive crime of transporting illegal aliens.
 23 See *United States v. Barajas-Montiel*, 185 F.3d 947, 953-54 (9th Cir. 1999) (conspiracy to
 24 transport illegal aliens “requires that the defendant knew that the alien was illegal and intended to
 25 further the alien’s illegal presence in the United States”) (emphasis added).

26 Inexplicably, the Indictment chooses to use the phrase “in furtherance of a violation of law.”
 27 (ECF No. 2 at 2.) Whether or not the alleged boat trip was in furtherance of a violation of law is
 28

1 not relevant or material to the charge in this case. What is relevant and material is whether the boat
2 trip was in furtherance of the aliens' illegal presence in the U.S. By relaxing the element of "in
3 furtherance of such violation of law" to any type of violation of law, the Indictment will mislead
4 a jury into thinking Mr. Yang is guilty so long as the boat trip was to further any type of violation.
5

6 Moreover, as discussed above, the Indictment contains references to illegal entry into
7 Guam. The combination of the phrase "in furtherance of a violation of law" with illegal entry can
8 only serve to mislead a jury into thinking Mr. Yang can be found guilty simply because entering
9 Guam was a violation of law and the boat trip was to further that entry.

10 Therefore, the phrase "in furtherance of a violation of law" should be struck. If the
11 Government suggests that it can be amended to conform to the phrasing of Section 1324, the Court
12 should not allow the amendment because assurance is lacking that the grand jury was not misled
13 into thinking Mr. Yang was guilty simply because entering Guam was a violation of law and the
14 boat trip was to further that entry.
15

16 C. Other References in the Indictment Raise Concerns

17 Mr. Yang moves to strike the above-described portions of the Indictment in this Motion
18 but reserves the right to move the Court to refrain from reading other portions or showing the entire
19 Indictment to the jury depending on evidence submitted at trial. There are other portions of the
20 Indictment that raise concerns, including:
21

- 22 1. Repeated use of "Chinese nationals" and "U.S. citizens" even though nationality is
not an element of the offense, which may prompt a jury to draw an unnecessary and
prejudicial distinction between Chinese nationals and U.S. citizens;
- 23 2. The identification of the co-conspirators as "previously indicted," which is
irrelevant, confusing to a jury who has no knowledge who was previously indicted
and for what offense, and potentially prejudicial, *see United States v. Malachowski*,
604 F.Supp.2d 512, 518-19 (N.D.N.Y. 2009) (striking reference to a firearm as
"with obliterated serial number" because it was irrelevant and may "compel some
jurors to infer that defendant sought to avoid detection because he intended to use
the pistol for a separate criminal purpose");

3. The reference to what happened after the boat departed Saipan (that is, the sentence “On or about July 10, 2023, the boat ran out of fuel and began to drift just before it reached the island of Rota, thus necessitating a rescue operation by the United States Guard.”), which is irrelevant and might potentially prompt a jury to think that Mr. Yang placed other people’s lives in danger, which is not a proper consideration in deciding whether Mr. Yang is guilty of the offense charged.

IV. Conclusion

For all the foregoing reasons, the Court should strike the parts of the Indictment identified in the beginning of this Memorandum of Law.

Respectfully submitted this 15th day of March, 2024.

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